

### **SYNOPSIS**

**PERSONAL INCOME TAX -- SENIOR CITIZENS' RETIREMENT EXCLUSION** -- Because W. Va. Code § 11-21-12(c)(5) unequivocally excludes from taxation \$2,000.00 of income derived from any federal retirement system, the statute is not invalid or incorrect, notwithstanding the fact that the Legislature has reasonably limited the overall senior citizen's exclusion in W. Va. Code § 11-21-12(c)(8)(i); the senior citizen's exclusion is not required at all and certainly may be reduced by statute in light of other exclusions.

### **FINAL DECISION**

The Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a personal income tax assessment against the Petitioners. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The assessment was for the year 2001, for tax, interest, through November 30, 2004, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioners.

Also, on November 30, 2004, the Accounts Monitoring Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a personal income tax assessment against the Petitioners. This assessment was for the year 2002, for tax, interest, through November 30, 2004, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioners.

Thereafter, by mail postmarked January 18, 2005, the Petitioners timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code § 11-10A-8(I) [2002].

Subsequently, notice of hearing on the petitions was sent to the Petitioners and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

Prior to the hearing, Petitioners remitted an amount, under protest, which represented the full amount of their 2001 and 2002 personal income tax assessments.

On March 29, 2005, this tribunal received in writing Petitioners' letter waiving their right to attend the hearing scheduled for April 5, 2005.

### **FINDINGS OF FACT**

1. During the 2001 and 2002 tax years, Petitioners, who are senior citizens, took both the modification exclusion provided for in W. Va. Code § 11-21-12(c)(5) and the modification exclusion provided for in W. Va. Code § 11-21-12(c)(9), resulting in a combined refund.

2. Because the Respondent later determined that Petitioners' total modification exclusion for each year could not exceed a certain amount, the Respondent issued personal income tax assessments for tax years 2001 and 2002.

### **DISCUSSION**

The only issue is whether the Petitioners have shown that the State of West Virginia unlawfully limits the modification exclusion.

W. Va. Code § 11-21-12(c) lists the modifications that can reduce federal adjusted gross income, one of which is set forth in paragraph (5), which limits the total modification exclusion

under that section for those receiving benefits under any federal retirement system; the latter is applicable to one of the Petitioners who is a retired federal employee.

Also, W. Va. Code § 11-21-12(c)(8) allows a modification exclusion by any person who has attained the age of sixty-five (65) on or before the last day of the taxable year. This section on its face would also be applicable to Petitioner, husband, who had attained the age of sixty-five (65) by year's end and had income of his own for tax year 2001 as well as for tax year 2002.

Notwithstanding the above, in that same subsection 12(c)(8) it reads: Provided, however, That:

(i) Where the total modification under subdivisions (1), (2), (5), (6) and (7) of this subsection is eight thousand dollars per person or more, no deduction shall be allowed under this subdivision; and

(ii) Where the total modification under subdivisions (1), (2), (5), (6) and (7) of this subsection is less than eight thousand dollars per person, the total modification allowed under this subdivision for all income received by that person shall be limited to the difference between eight thousand dollars and the sum of modifications under subdivisions (1), (2), (5), (6) and (7) of this subsection;

Respondents' counsel argued at hearing that when the sections are read together it is clear that having taken the retirement exclusion, Petitioners are then only entitled to take an additional exclusion of a lesser amount because the overall total modification exclusion cannot exceed the allowable amount.

Petitioners argue, however, that the limitations now imposed on the senior citizens reducing modification contained in W. Va. Code § 11-21-12(c)(8) have the effect of imposing tax on retirement income, which has previously been excluded from tax under W. Va. Code § 11-21-12(c)(5).

This tribunal, however, concludes otherwise, because although W. Va. Code § 11-21-12(c)(5) exempts or otherwise excludes an amount of income derived from any federal

retirement system, it is also clear that W. Va. Code § 11-21-12(c)(8) in concert with 12(c)(8)(i) and (ii) were adopted by the West Virginia Legislature to deal singularly with the senior citizen exclusion, which the Legislature had every right to do.

Accordingly, it is DETERMINED that because W. Va. Code § 11-21-12(c)(5) excludes only a certain amount of federal retirement income from state taxation and because the West Virginia Legislature had every right to limit the senior citizens' exclusion, neither is invalid as applied to the Petitioners' tax filing.

It should be noted that in a prior case the parties were duly informed at the outset of the administrative hearing that this tribunal did not have the authority to hold any section or subsection of the personal income tax statute unconstitutional on its face and that short of that prohibition, this tribunal would render its decision based solely upon language in the statute and whether the same could be lawfully applied.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just "lip service" to two general points: (1) rather than utilizing a purely "*de novo*" scope of review, due deference is to be given by all reviewing tribunals to the expertise of the administrative agency, in this case, the State Tax Commissioner, even with respect to an "issue of law," when that issue of law is one within the expertise of the administrative agency, *see Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995); and (2) any applicable legislative regulation does not merely reflect the administrative agency's position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the

usual, deferential rules of statutory construction, *see Feathers v. West Virginia Board of Medicine*, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court [including this tribunal] is whether the agency’s answer is based on a permissible construction of the statute.” Syllabus point 4, in part, *Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner need not write a rule that serves the statute in the best or most logical manner; he [or she] need only write a rule that flows rationally from the statute.” *Id.*, 195 W. Va. at 588, 466 S.E.2d at 439 (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” *Appalachian Power*, 195 W. Va. at 589, 466 S.E.2d at 440 (*quoting Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

## CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for

reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioners-taxpayers in this matter have failed to carry the burden of proof with respect to the issue of whether limiting the Petitioners, as senior citizens, to the allowable total modification constitutes the taxation of retirement income because a portion of federal retirement income is in fact excluded from taxation pursuant to W. Va. Code § 11-21-12(c)(5). *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

#### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioners for the year 2001, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment against the Petitioners for the year 2002, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Because Petitioners have previously remitted an amount, which represents the erroneously paid tax refund for the years 2001 and 2002, only a small amount of interest and additions to tax remains due and owing.

For the same reasons, the Petitioners' petitions for refund, of the assessment amounts paid under protest, are hereby **DENIED**.